F. & D. No. 2597.
I. S. No. 1727-c.

Issued February 21, 1913.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1939.

(Given pursuant to section 4 of the Food and Drugs Act.)

MISBRANDING OF CHEWING GUM.

On November 1, 1911, the United States Attorney for the District of Oregon, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the American Chicle Co., a corporation organized under the laws of New Jersey, authorized to do business at Portland, Oreg., alleging shipment by said company, in violation of the Food and Drugs Act, on or about July 30, 1910, from the State of Oregon into the State of Washington of a quantity of Beeman's Pepsin Chewing Gum which was misbranded. The product was labeled: "Beeman's Pepsin Chewing Gum (Trade Mark) A delicious remedy for all forms of indigestion. Originated by the Beeman Chemical Company, Manufactured by American Chicle Company, successor, incorporated. Cleveland, Ohio, U. S. A. Price 5 cents. Each of the inclosed tablets contains sufficient Beeman's Pure Pepsin to digest 2,000 grains of food. Guaranteed by American Chicle Co. under the 'Food and Drugs Act' June 30th, 1906. Serial No. 1557."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed it to contain practically no pepsin. When three tablets of the gum which according to the statement of the manufacturer should contain about one-tenth gram of pepsin, were finely divided and substituted for the one-tenth gram of pepsin as per U. S. P. assay for pepsin, the gum solution showed no effect whatever upon the egg albumen, while the pure pepsin solution dissolved the albumen almost completely. Misbranding was alleged in the information for the reason that each of the tablets inclosed in the packages of the product contained not more than one-tenth milligram of pepsin, equivalent to but a trace of said substance, which would be and was ineffectual to accomplish the purpose for which pepsin is ordinarily used, whereas the statement "Beeman's Pepsin Chewing Gum" upon the packages and labels thereof was calculated to and did convey to intending purchasers of the product the idea that a

of the statute yet any manufacturer who, in addition to that, put on the label a statement to the effect that that article contains certain ingredients and that statement was false, it would be a misbranding. So in this case. Again it is said where an article is sold like, for instance, Beeman's Pepsin Chewing Gum under that name alone, it would not be a misbranding if it contained no pepsin. Now, I am not prepared to say whether that is the law or not nor is it necessary in this case because here the defendant has gone beyond that and not only branded the article "Beeman's Pepsin Chewing Gum" but it has undertaken to state and has stated that it contains pepsin in sufficient quantity to digest 2000 grains of food and that the Government charges to be false, and that is one of the issues and the important issue in the case.

The burden is on the Government to sustain the charge made in the information. In other words it must prove that this label was either misleading and calculated to deceive the public or that it is false. In other words, that fact that it was false would prove that it was misleading as far as this case is concerned. The statement on the package is that it contained pepsin sufficient to digest a certain quantity of food. That statement is either true or false. If false it is a misbranding; if true it is not misbranding.

The label contains, as you will remember, another statement, and that is that "this package is a delicious remedy for all forms of indigestion." There is no charge in the information that the defendant violated the statute by this statement on the label and indeed the courts have held that that is not misbranding within the meaning of the pure food law. The mere statement on a package of this kind that it contains a delicious remedy for all forms of indigestion would not be misbranding and there is no charge in this case that it is.

Now during this trial there has been a great deal of expert testimony—men and a woman skilled, or professing to be skilled in the art of chemistry have been called and testified as witnesses before the jury, and they have given the results of their analyses of this product and their conclusions from such analyses. This testimony has been admitted to advise the jury, but you are not bound to follow the testimony of any of these experts or all of them unless you are satisfied—unless it meets with your approval. You are to find the facts in this case from the testimony—all the testimony as you understand it, and in weighing this testimony, you will not of course overlook the fact that the man who actually manufactured this product testified before you in reference to its ingredients and the amount of pepsin, if any, put in *the* (?) and manner in which it was manufactured, and with that testimony together with the expert testimony that has been given here it is for you to determine from this record whether or not the label was false or misleading and that you must determine from the evidence—from the testimony as you understand it and according to your own conclusion, and not the conclusions of any one else.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, his appearance on the witness stand, evidence affecting his credibility, or his interest in the controversy as it may be manifested at the trial, or may appear during the trial.

Mr. MAGUIRE: Just one thing. I would like to have the instruction given in accordance with the law laid down in United States vs. 443 Cans of Frozen Egg Products, and that the condition of the product in the hands of the consumer is the place and time to test its fitness.

COURT: I have already said to the jury that the question here is whether this label was true or false as applied to the product after it was manufactured and at the time it was shipped and put on the market.

Mr. COLE: Just simply to follow out, I want to save the same points I have been trying to save all the way through this case, for that reason I want to save exceptions

to the court's refusal to give the instructions requested by the defendant, Nos. 1, 2, 3, 4—I think you gave 5, didn't you?

COURT: Yes, I gave five.

Mr. COLE: Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. And also save an exception to that part of the court's instruction in reference to the 2000 grains of food. I don't remember just the wording.

COURT: That will be sufficient for the record. That calls my attention to a matter that I overlooked.

As I said to you, Gentlemen, this information contains two counts. In other words it is charged that the alleged misbranded article was a food, and it is also charged that it is a drug. I suppose the District Attorney, in drawing the indictment was in doubt about that so he charged it both ways, but you can only find the defendant guilty on one or the other of these counts, if you find him guilty at all, for it must be either a drug or a food. If it is a food and misbranded, it is a violation of the statute. If it is a drug and misbranded, it is a violation of the statute. Now, these terms are defined in the statute: "The term 'drug' as used in this act shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals. The term 'food' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals whether simple, mixed or compound," and I think it must be a question of fact for you to determine from this testimony whether this is a food or a drug.

Mr. MAGUIRE: As to that portion, I don't think it makes any particular difference in this case, but in order that the notice of judgment may show the proper exceptions if it should be appealed, I would like an exception to the court's ruling that the article must be one or the other—that no article could be both a food and a drug.

Mr. COLE: If the court please, that doesn't seem to suit either one of us. I would like to save an exception on that too.

COURT: You want it to go to the jury as both?

Mr. COLE: No, I want an instruction that it is a food.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *November 13, 1912.*

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